

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

OCT 30 2003

OFFICE OF  
MANAGING DIRECTOR

Rodney L. Joyce, Esq.  
Shook, Hardy & Bacon, LLP  
Hamilton Square  
600 14<sup>th</sup> Street, N.W., Suite 800  
Washington, D.C. 20005-2004

Re: Request for Refund/Waiver of Application Fees  
Corban Communications, Inc.  
Fee Control No. 0305138994870001

Dear Mr. Joyce:

This is in response to your request (dated May 27, 2003) for refund of the common carrier microwave license application fees filed on behalf of Corban Communications, Inc. (Corban). Specifically, you request that the Commission refund the application fees associated with reapplying for 45 licenses that the Commission "cancelled late last year at Corban's request" and modifying "eight other licenses by restoring receive sites that the FCC . . . deleted late last year at Corban's request." Our records reflect that you paid the \$16,160.00 application fees at issue here (i.e., 45 license applications multiplied by \$320.00 (\$14,400.00) plus eight modification applications multiplied by \$220.00 (\$1,760.00)).

The Commission has discretion to waive filing fees upon a showing of good cause and a finding that the public interest will be served thereby.<sup>1</sup> We construe our waiver authority under section 8 of the Communications Act, 47 U.S.C. §158(d)(2), narrowly and will grant waivers on a case-by-case basis to specific applicants upon a showing of "extraordinary and compelling circumstances."<sup>2</sup>

In support of your request, you assert that a denial of the refund request would cause Corban financial hardship. In a supplement to your May 27 letter (dated September 9, 2003), you submit a copy of Corban's cash flow statement for the period from April 1, 2003 through June 30, 2003, the period during which Corban paid the application fees. In establishing a fee program, the Commission recognized that in certain instances payment of a fee may impose an undue financial hardship upon a licensee. The

---

<sup>1</sup> See 47 U.S.C. §158(d)(2); 47 C.F.R. §1.1117(a); *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 5 FCC Rcd 3558, 3572-73 (1990).

<sup>2</sup> See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 958, para. 70 (1987); *Sirius Satellite Radio, Inc.*, 18 FCC Rcd 12551 (2003).

Commission therefore decided to grant waivers or reductions of its fees in those instances where a petitioner presents a "compelling case of financial hardship."<sup>3</sup> In reviewing a showing of financial hardship, the Commission relies upon a licensee's cash flow as opposed to the entity's profits, and considers whether the station lacks sufficient funds to pay the regulatory fee and maintain service to the public. Thus, even if a station loses money, any funds paid to principals, deductions for depreciation, or similar items are considered funds available to pay the fees.<sup>4</sup> The cash flow statement that you provide indicates that on June 30, 2003, Corban had sufficient funds to pay the \$16,160.00 application fees. These funds included cash, as well as amounts representing depreciation and amortization, which the Commission considers to be funds available to pay the application fees. We therefore find that you have failed to establish grounds for a waiver of the application fees based upon financial hardship. Your reliance upon the *Global Crossing Decision*<sup>5</sup> does not persuade us otherwise because our decision to waive the application fees at issue there was based upon the licensee's bankruptcy, a fact which is not in evidence here. Your reliance upon the *Hispanic Keys Decision*<sup>6</sup> is equally unpersuasive because the licensee in that case established that it had suffered a financial loss without regard to any deduction for depreciation under our policies as described above during the period in question, which you have not.

In your request, you also assert that Corban "forfeited the licenses for which it is now reapplying for reasons that were beyond its control, not because it wanted to do so." You state that for much of 2002, Corban was involved in "expensive litigation" with Pinnacle Towers, Inc. (Pinnacle), the owner of most of the towers upon which Corban's microwave transmission equipment is located, regarding Pinnacle's "demand" that Corban "immediately vacate all of Pinnacle's towers." You state that after numerous unsuccessful attempts by Corban to settle the dispute and to find other towers upon which to place its microwave equipment, Corban filed an application with the Commission on August 22, 2002 "requesting consent to exit the microwave service business entirely." You state that Corban filed the application to stop the "hemorrhaging of cash that the litigation with Pinnacle was causing" and to allow Corban "to abandon Pinnacle's towers

---

<sup>3</sup> See *Implementation of Section 9 of the Communications Act*, 9 FCC Rcd 5333, 5346 (1994), *on recon.*, 10 FCC Rcd 12759 (1995) (*Implementation of Section 9 Reconsideration*).

<sup>4</sup> See *Implementation of Section 9 Reconsideration*, 10 FCC Rcd at 12761-62.

<sup>5</sup> See Letter from Mark A. Reger, Chief Financial Officer (CFO), FCC, to Jean L. Kiddoo, Esq., Helen E. Disenhaus, Esq., and Troy F. Tanner, Esq. (dated Mar. 12, 2002) (*Global Crossing Decision*).

<sup>6</sup> See Letter from Mark A. Reger, CFO, FCC, to C. Michael Curry, Esq. (dated Feb. 25, 2002) (*Hispanic Keys Decision*).

as quickly as possible to help persuade Pinnacle to negotiate a settlement to the . . . dispute[.]” You state that the strategy was successful and on December 20, 2002, Pinnacle and Corban signed a settlement agreement in which Corban purchased Pinnacle’s towers, thereby allowing Corban to provide microwave service in the areas where it had discontinued service and on the facilities which are the subject of the instant applications. We find that Corban’s “forfeiture” of the licenses that are the subject of the instant applications was a strategic business decision to expedite a settlement of private litigation with Pinnacle and, as such, was a voluntary act entirely within Corban’s discretion and under its control. In deciding to request that the Commission cancel or delete the licenses, Corban should have foreseen that its strategy to persuade Pinnacle to settle the dispute might be successful and reasonably understood that Corban would then have to file the applications at issue here in order to restore microwave service to its customers. We therefore find that Corban has not shown good cause or a public interest basis for waiver, nor sufficiently extraordinary or compelling circumstances as to warrant a waiver of the application fees.

In further support of your request for relief you also assert that the Commission will spend far fewer resources in processing the instant applications than other applications for common carrier fixed point-to-point microwave licenses because the instant “applications request authority to operate in precisely the same locations and under precisely the same technical terms that were provided for in the authorizations that Corban had forfeited just a few months ago.” The Commission has stated that there is “no justification in the statute or legislative history for apportioning fees according to the actual work done on any particular application.”<sup>7</sup> The Commission has also noted that “processing costs were but one factor in the rough calculus that resulted in the legislated fees.”<sup>8</sup> Further, in implementing section 8, we stated that “[i]t is not our intention to make individualized determinations of the ‘appropriate fee.’ Rather, except in unusual cases in which the public interest requires otherwise, we will levy the fee as determined by Congress.”<sup>9</sup> The fact that Corban is reapplying for licenses which it recently sought to cancel or delete does not obviate the necessity for a full and substantive review by Commission staff of the instant applications. We therefore find that you have failed to establish grounds for a waiver of the applications fees on the basis of alleged low-processing costs. Your reliance on the *Digital Broadcasting Decision*<sup>10</sup> does not

---

<sup>7</sup> *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 949 (1987) (*Establishment of a Fee Collection Program*).

<sup>8</sup> *Id.*

<sup>9</sup> *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 3 FCC Rcd 5987 (1988).

<sup>10</sup> See Letter from Mark A. Reger, CFO, FCC, to Patricia J. Paoletta, Esq., Todd M. Stansbury, Esq., Jennifer D. Hindin, Esq. (dated June 24, 2002) (*Digital Broadcasting Decision*).

persuade us otherwise because our decision to waive application fees in that case was based on the "special circumstances" involving processing "large numbers of 'technically identical small antenna earth station facilities.'"<sup>11</sup> We therefore deny your request for relief from the common carrier microwave license application fees.

You have also requested confidential treatment of the material that you submitted with your request for fee relief. Pursuant to section 0.459(d)(1) of the Commission's rules, 47 C.F.R. §0.459(d)(1), we do not routinely rule on requests for confidential treatment until we receive a request for access to the records. The records are treated confidentially in the meantime. If a request for access to the information submitted in conjunction with your application fees is received, you will be notified and afforded the opportunity to respond at that time.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Reger", with a large, stylized initial "M" and "R".

for Mark A. Reger  
Chief Financial Officer

---

<sup>11</sup> *Id.* at 2 (citing *Establishment of a Fee Collection Program* at paras. 245-248) (referencing "blanket" applications for earth stations).